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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MARTIN KAPRELIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the due process clause of the Constitution of the United States of America requires that when law enforcement agents coerce from a minor information provided to the minor by the minor's parent in confidence, the information and evidence derived therefrom must be excluded from trial by means of a parent-child privilege.

2. Whether judicial authorization is required before the government can require forced disclosure of information from a child obtained in confidence from the parent.

3. Whether a parent can invoke the parent-child privilege where information given in confidence to the child by the parent is forced by the government from the child.

PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Martin Kaprelian, was the defendant in the District Court for the Northern District of Illinois, Eastern Division, and appellant in the Court of Appeals for the Seventh Circuit. Respondent, United States of America, was plaintiff in the District Court, and appellee in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Martin Kaprelian (hereafter, defendant), prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming his conviction and sentence for

conspiracy to transport stolen merchandise in interstate commerce, transportation of such goods, and concealing and storing merchandise moved in interstate commerce, in violation of 18 U.S.C. 371, 2314 and 2315.

Judgment, Opinion and Order Below

The Opinion of the Court of Appeals for the Seventh Circuit, No. 84-1239, not yet published, is set out as Appendix A.

Jurisdictional Statement

On July 25, 1985, the Court of Appeals for the Seventh Circuit filed its Opinion herein. (App. A) Defendant's timely Petition for Rehearing was denied on August 29, 1985. (App. B) This petition to review the judgment of a federal court of appeals is timely filed within 60 days after denial of petition for rehearing. Jurisdiction is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court.

Constitutional Provision

AMENDMENT [V.]

No person shall be ... deprived of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Nature of the Case

Defendant, Martin Kaprelian, was indicted, with others, for conspiracy to transport stolen merchandise in interstate commerce, transportation of such goods, and concealing and storing merchandise moved in interstate commerce, in violation of 18 U.S.C. 371, 2314 and 2315. A jury convicted defendant as charged, and defendant was sentenced to nine years concurrently on the transportation and concealing and storing counts. Imposition of sentence on the conspiracy count was suspended and defendant was placed on probation for five years.

The Court of Appeals for the Seventh Circuit affirmed (App. A) and defendant's timely Petition for Rehearing was denied on August 29, 1985.

Jurisdiction of Trial Court [per Rule 21.1(i)]

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction ... of all offenses against the law of the United States." Defendant was charged with having committed an offense against a law of the United States, to wit, 18 U.S.C. 371, 2314 and 2315.

Statement of Facts

(Evidence not relevant to the issues of government intrusion into the parent-child relationship is omitted in the interest of brevity.)

On August 25, 1982 in LaCrescent, Minnesota, a car was stolen at a gas station, a car which contained $70,000.00 in jewelry. The car was recovered in Minnesota.

FBI Agent William Lueckenhoff, a 6'3", 225 pound man, and his partner, James Whitmer, 6'1", 220 pounds, left a stake-out of a residence in Chicago, and following the defendant's minor child on her bicycle in their vehicle, forced her and her bike to be curbed. With a show of authority, Lueckenhoff interrogated her extensively. The minor child tried, but was not permitted to leave. In

support of defendant's motion to suppress, she stated:

> "I felt I could not leave and had to answer their questions ... I did what they told me. They asked me a lot of questions about my father and his friends. I was crying. I was very upset. They asked me if I knew where my father lived; I didn't. At one point, I threw my bike down and started to leave. I was told to come back. I believed I had to return. I felt I was required to answer their questions. I gave them the phone number that my father had given me so that he and I could communicate."

(Submitted to the court was her affidavit that is attached as Appendix C.)

The minor child, whose parents were estranged, was in possession of a confidential telephone number at which she might reach her father, defendant herein, in case of emergency, or when she simply needed to talk to her father. The phone number led directly to the

defendant's address. At that address the agents found the jewelry and other evidence used against defendant. The agents had no independent means of locating that address.

In support of a motion to suppress, Armensue Kaprelian, the minor child of defendant, stated:

> "In 1982, my father provided me with a phone number so that I could communicate with him. My father had given me this phone number, exclusively. The phone number was installed solely so he and I could talk to each other.
>
> The phone number was exclusively for my father and I to use. I had never given that phone number to anybody else."

REASON FOR GRANTING THE WRIT

The decision below--that no parent-child privilege protects the minor child of a suspect against coercive questioning which has as its aim the seizure of that suspect and evidence against him--leaves minor children helpless against incursions into their relationship with their parents and provides no avenue whereby such incursions will be limited by prior judicial review. The result is a dangerous certainty of greater intrusion by the state agents into the private character of lawful parent-child relationships, a violation of relationship which underlies ordered constitutional liberty.

Certiorari should be allowed to permit this Court to determine the application

of the due process clause to this circumstance and frame a parent-child privilege which permits the exclusion of evidence so obtained.

ARGUMENT

1.

The due process clause of the Constitution of the United States of America requires that when law enforcement agents coerce from a minor information provided to the minor by minor's parent in confidence, the information and evidence derived therefrom must be excluded from trial by means of a parent-child privilege.

Wise man: the right of citizens to have counsel is fundamental to a democracy; to preserve that right the attorney-client privilege exists.

Courts and the legislature: we agree, we agree.

Wise man: good health care is essential to a mentally and physically healthy society; to ensure such care the doctor-patient privilege exists.

Courts and legislature: we agree, we agree.

Wise man: freedom of religion is essential to the spiritual well-being of a democracy; to protect that right the clergy privilege must exist.

Courts and the legislature: we agree, we agree.

Wise man: a strong family unit is essential to the physical, mental, religious and general well-being of a democracy, and hence there must be a parent-child privilege.

Courts and the legislature: we disagree, we disagree.

Wise man: how can that be?

Courts and the legislature: parents and children have no lobbyists in state capitols and in Congress.

Wise man: maybe they have something better, the United States Supreme Court.

And of course parents and children need the lobbying authoritative voice of the United States Supreme Court, because without it, due to the opinion in this case, the police will be able to pressure the minor child of a suspect in order to extract from that minor child information which leads to discovery of evidence against the suspect parent, even where that information is confidential between parent and child and itself innocent of any criminal content. The Court of Appeals affirmed the trial court in holding that there is no parent-child privilege, and went on to say that even if there were such a privilege, the privilege was not breached here by improper governmental action, because the privilege would not extend to excluding evidence obtained based upon information

extracted from the minor child.

The holding of the court below, and the holdings of other Courts of Appeal[1] that a parent-child privilege does not exist is an open invitation to intrusive and heavyhanded government action which will be increasingly destructive to the family unit. This Court must therefore grant certiorari and upon review hold that such a privilege exists.

There must be a parent-child privilege if the family unit, fundamental to the civil order which provides the foundation for the United States Constitution, is to

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1. Opinions of District Courts of Appeals that there is no parent-child privilege are as follows: In re Grand Jury Proceedings (Starr), 647 F.2d 511, 512-513 (5 Cir. 1981); United States v. Jones, 683 F.2d 817 (4 Cir. 1982); In re Grand Jury Subpoena (Santarelli), 740 F.2d 816 (11 Cir. 1984).

be sustained.

In Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 52 L.Ed.2d 531, 97 S.Ct. 1932, this Court has noted:

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."

Keeping parent-child communications private is essential to the well-being of the family unit.

In Before the Best Interests of the Child,[2] the authors, J. Goldstein, A.

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2. Before the Best Interests of the Child, The Free Press, McMillan Publishing Co. Inc., New York, 1979, by Joseph Goldstein, Law School, Yale University, Anna Freud, Hampstead Child Therapy Clinic, Albert J. Solnit, Child Study Center, Yale University.

Freud, and A. Solnit, state that child-parent privacy rights are essential to the well-being of the family. Referring to adolescence, the authors write:

> "These complex and vital developments require the privacy of family life under guardianship by parents... When family integrity is broken or weakened by state intrusion ... the effect on the child's developmental progress is invariably detrimental. The child's need for safety within the confines of the family must be met by law through its recognition of family privacy as the barrier to state intrusion upon parental autonomy in child rearing. These rights--parental autonomy, a child's entitlement to autonomous parents, and privacy--are essential ingredients of family integrity." Id. p. 10. (Emphasis added.)

As was perceptively noted by one commentator on the child-parent privilege:

> "The importance of open communication between parent and child has been emphasized by psychologists and family counselors. Effective parental guidance, like effective therapy, does not depend on a specific treatment so much as it depends on the quality of the interchange. The quality of a child's communication with his parents influences his future interpersonal relationships and general social development. Children who feel free to confide in their parents show better adjustment than those who do not confide... Joint parent-child activities and associations usually diminish during the child's adolescence but if the parents are available to the child there is unlikely to be a break in the relationship."[3]

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3. Stanton; Child-Parent Privilege for Confidential Communications: An Examination and Proposal, Vol. XVI, Number 1, Family Law Quarterly 1, 41 (1982).

As has been well stated:

> "The appeal ... of a child-parent privilege for confidential communications is that it will help ensure the confidentiality of intra-family communications. Parents' assurances to children that they should trust and confide in their parents because they are a constant source of help and concern will be bolstered. Parents and children alike will be gratified to know that they can keep promises of secrecy to each other without risk of state inquiry during legal proceedings." Stanton, p. 46, supra, Note 2.

Since the need for the parent-child privilege is founded upon the survival of a societal order essential to the existence of constitutional government, such a privilege can be recognized by a court sworn to uphold the United States Constitution. Federal Rule of Evidence 501 did not "freeze the law of privilege

... (but) ... rather was to 'provide the court with the flexibility to develop rules of privilege on a case-by-case basis' and to leave the door open to change." Trammel v. United States, 445 U.S. 40, 63 L.Ed.2d 186. As the concept of due process is a continually growing concept, Franks v. Maryland, 359 U.S. 360, 3 L.Ed.2d 877 (1959), so too the courts must adapt to the needs of American society by recognizing a parent-child privilege.

To fail to recognize such a privilege is to bring this constitutional order closer to the possibility that, as in the Nazi Germany of the 1930's, parent and child will not be able to speak openly or freely to each other, because neither will know what state interference might

lead to revelation of their confidences, breach of their familial trust.

The Court of Appeals relies upon clearly distinguishable cases in determining there is no child-parent privilege. The cases relied upon by the Court almost universally involve the situation where prior to obtaining information, a court, a neutral and detached magistrate, has balanced the need of the family versus the need of good government. These cases must be inapplicable to a situation where a police officer, caring not for the needs families have in society, but zealously pursuing his desire to catch the suspect, invades the family. That is not a situation in which measured and judicious consideration and prior notice mitigate damaging effect. Instead it is a

situation in which incalculable damage may be done to the family by the offensive, violative and unwarranted intrusion. This Court has often held that invasions of privacy may require prior judicial aproval. Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639 (1980); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1946). Hence, the cases relied upon by the Court are irrelevant to the situation here, where we do not have a judicial officer authorizing the determination to violate the confidences between parent and child.

In order to ensure that police officers do not bash their way into the family unit without prior judicial determination that such action is appropriate and necessary, a parent-child privilege must exist.

Police coercion of defendant's minor child forced disclosure of information provided from defendant to the child in confidence and which was essential to the parent-child relationship. Here, the information forced from the child was provided to the child with the intent by both parent and child that it be held in confidence. The daughter of defendant stated:

> "In 1982, my father provided me with a phone number so that I could communicate with him. My father had given me this phone number, exclusively. The phone number was installed solely so he and I could talk to each other.
>
> The phone number was exclusively for my father and I to use. I had never given that phone number to anyone else."

The government never disputed the truth of that statement.

Considering the intent of the parties, the purpose for which that phone number was given to the daughter must be protected by the privilege. A minor child separated from a parent was provided information for the sole purpose of keeping communications open between parent and child, an act for the welfare of the child. To hold there is no privilege is to tell parents they may not act in their child's welfare if to do so requires sharing harmless[4], but confidential information--because some interest in society may desire disclosure of such information.

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4. The information here was not criminal, but merely related to the parent's location.

The Court of Appeals held that any parent-child privilege must be limited to the actual utterances or expressions between child and parent and not to the fruits of the information obtained. The court stated:

> "Even were there some substantial support for the defendant's proposition that there is a parent-child privilege this case would not be one in which it could be applied. Privileges apply only to prevent the use of testimony in a judicial proceeding. Kaprelian's daughter gave the F.B.I. agent his telephone number during the F.B.I.'s investigation of the jewel robbery. As the Supreme Court has noted, '[n]either Hawkins, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other to aid in the other's apprehension.' Trammel, 445 U.S. at 52 n. 12. Kaprelian makes no assertion that the government ever intended to call his daughter at the trial; his assertions of privilege are based solely on her questioning during the investigation. Thus

> neither this phone number nor any other evidence obtained through this critical investigative lead are subject to suppression by the district court." (Opinion, p. 11)

Reliance on Hawkins, a marital privilege case, is inappropriate. The strict confines of the marital privilege are not broad enough to protect the family privacy involved in parent-child communications. There are crucial differences. Spouses, after all, are adults, with the ability to withstand requests for information. Children are often unable to resist the forceful demands of adults seeking information. In the context of testimony against a parent, one observer has noted that:

> "... children tend to accumulate tremendous amounts of information about their parents' activities and are party or witness to many communications made by their parents with an expectation of

> confidentiality. Obviously, children can provide an excellent source of evidence about and against their parents, particularly if they are too young to appreciate the implications of disclosing such information ..." Kandoian, The Parent-Child Privilege and The Parent-Child Crime: Observations on State v. DeLong and In Re Agosto, Vol. 36, Number 1, Maine L.R., 1984.

The more innocent or respectful of authority the child, the less cynical or sophisticated, the more forceful and intrusive an inquisitor is able to be. Children must be protected from over-zealous police officers coercing them to disclose material that is held privileged between the child and the parent. A rule that excludes merely the disclosed information and not the fruits is a privilege that leaves children unprotected, for often it is what is obtained from the information forced out

of the mouths of the children, and not what they say directly, which will be helpful in the prosecution of the parent.

There will be no protection afforded the family unit if, as the Court of Appeals suggests, any parent-child privilege can extend only to prevent the State from forcing family members to testify against each other. Such a limited protection, which would not apply to the fruits of a police officer's actions in ravaging the family unit, will not afford the family the essential protection the facts of this case demand.

This Court should also reject the holding that the father of a child who has provided the child with confidential information for the purpose of enhancing the parent-child relationship should not be able to invoke the privilege. This

position defies logic and law. It defies logic because, as in the husband-wife privilege, it is the party who conveyed the information with the expectation of privacy who should be able to invoke the privilege. Hence, even under the test in Rakas v. Illinois, 439 U.S. 128 (1978), the parent would have standing because the parent would have an expectation of privacy, an expectation that matters between him and the child were privileged.

The unwarranted intrusion into the relationship of parent and minor child perpetrated by government agents in this case requires the assertion of a parent-child privilege by this Court. In order to protect fundamental human rights which underlie our system of constitutional law and ordered liberty, such a privilege

must extend to exclusion of evidence obtained against a parent-defendant as a consequence of government pressure asserted against a minor child.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1239

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PATRICIA DAVIES and MARTIN KAPRELIAN,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 597—John A. Nordberg, *Judge.*

ARGUED JANUARY 25, 1985—DECIDED JULY 25, 1985

Before BAUER, ESCHBACH, *Circuit Judges,* and FAIRCHILD, *Senior Judge.*

BAUER, *Circuit Judge.* Martin Kaprelian, Patricia Davies, and William Burke were indicted for conspiring to transport stolen merchandise in interstate commerce, and concealing and storing stolen merchandise moved in interstate commerce, in violation of 18 U.S.C. §§ 2314 & 2315. Two days before trial Davies entered a conditional plea of guilty but reserved an appeal on a pre-trial motion to suppress. A jury convicted Kaprelian on all three counts of the indictment and acquitted Burke. On January 18, 1985, this court dismissed Davies's appeal on the government's motion and without objection from Davies, as the brief on appeal has raised no issue regarding the suppression motion which Davies reserved for appeal. After a consideration of each issue raised by Kaprelian on appeal, we affirm his conviction.

I

On August 25, 1982, at approximately 6:00 p.m., Richard Romero, a manufacturer's representative for the Star of Africa Jewelry Company, drove his red Cadillac to a Standard Oil gasoline station in LaCrescent, Minnesota. He had approximately $70,000 in jewelry in two sample cases locked in the trunk of his car. Romero got out of the car, filled his tank at a self-service pump, and went to pay for the gasoline, leaving the keys in the ignition of the car.

While Romero was paying for the gasoline, a man came across the street from a Burger Chef restaurant and drove the Cadillac away. Jo-Ann Koeller was at the Burger Chef at this time and testified that she saw a medium brown car parked near her car. A man standing next to the brown car walked rapidly across the street and took off in Romero's Cadillac. About a half-hour later, Sue Kline was in Pettibone Park in LaCrosse, Wisconsin,[1] when a red Cadillac pulled into the park and a man got out and opened the trunk. Several minutes later, a brown Buick pulled up next to the Cadillac and the drivers of both cars placed two suitcases from the Cadillac into the trunk of the Buick. As both cars drove away, Kline wrote down the license number of the Buick. As she left the park later, she saw the Cadillac parked about five blocks away and gave the license number of the Buick to the police. About the same time that evening, Deborah Vogl also was in Pettibone Park and observed the two cars stop and the driver of the Cadillac get into the Buick. The Buick then left, leaving the unattended Cadillac behind.

At 6:40 p.m., Officer Dave Hanson of the LaCrosse Police Department stopped the Buick a half-mile from the

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[1] LaCrescent and LaCrosse are on opposite sides of the Mississippi River, five miles apart, with bridges and a highway across an island between. Pettibone Park is on the island, with access from the same highway. It takes only a few minutes to drive from LaCrescent to the Park, and the Park is an easy place to pull off the highway before going through downtown LaCrosse.

park. Davies was the driver and sole occupant of the Buick, which had the same license number which Kline gave to the police later that evening. After several minutes of conversation with Hanson, Davies returned to the car and drove off. Six hours later, Davies was spotted in the same Buick on the northwest side of Chicago.

Based upon investigative information from other jewel thefts linking Davies and Kaprelian, the Federal Bureau of Investigation on August 26 placed Kaprelian's last known address in Chicago under surveillance and searched the neighborbood for the brown Buick, which they did not find. While F.B.I. agents were watching the house, a teenaged girl left the house and rode off on a bicycle. The agents followed her in their car for several blocks and eventually pulled her to the side of the street by honking the car's horn. The agents identified themselves to her and asked if they could question her. She reluctantly stated that Kaprelian was her father and that Davies was his girlfriend, with whom he was living. She also reluctantly gave them a phone number at Davies's address which her father had given her. Based on this information, the F.B.I. began a surveillance of Davies's apartment.

The F.B.I. then placed Davies's apartment in Harwood Heights, Illinois, under surveillance, and observed Davies and Kaprelian the following afternoon enter one of the apartments, which was leased in the name of Helen Benson, one of Davies's known aliases. Fifteen minutes later Davies left carrying a tote bag and another small bag. She took an elevator to the garage of the apartment building and drove a yellow Oldsmobile out of the garage and parked it in front of the building. As Davies walked to the front door of the building, one of the agents watching the building arrested Davies.

In the ensuing search of the Oldsmobile, the agents found the bags that Davies was seen carrying. Inside the bags, the agents found most of the jewelry still in the

original packages and display cases. Also found were a computer printout and business labels that Romero had reported stolen along with the jewelry. Kaprelian's fingerprints were identified on one of the jewelry packages, the computer printout, and a folder which contained the printout.

During Davies's arrest, two other agents were watching Davies's apartment and saw Kaprelian leave it. The agents stopped Kaprelian, identified themselves, conducted a pat-down search, and questioned him about his presence in Davies's apartment. When shown a picture of Davies, Kaprelian denied knowing who she was, even though he in fact had known her for nearly six years. Kaprelian asked to leave and was released twenty-five minutes later.

On August 27, F.B.I. agents found the brown Buick in the basement of Davies's apartment building in a stall rented to Davies under the name of Helen Benson. Inside the car was a LaCrosse, Wisconsin, newspaper dated August 25 and a road atlas opened to Wisconsin. The license plates on the car were different from those it had on August 25, the new plates having been issued on an application filed with the Illinois Secretary of State on August 26 or 27. Pursuant to a search warrant, the agents then searched Davies's apartment and found more of the stolen jewelry, some items containing Kaprelian's name, and a receipt for the new license plates.

II. PARENT-CHILD PRIVILEGE

Kaprelian's first claim of error is that the stop by the investigating agents of Kaprelian's daughter was a violation of the fourth amendment and that the telephone number which they received from her and the other evidence obtained through use of the phone number should be suppressed as a violation of a purported parent-child privilege. Kaprelian argues that because he had given the telephone number to his daughter, who apparently was

living with his estranged wife, in confidence and for emergency use, the agent's coercion of that number from his daughter is inadmissible evidence and that all evidence obtained through that number, principally Davies's address, also should be suppressed as tainted evidence.

We find several errors in this argument. First, to the extent that the agents' conduct can be construed as a violation of the daughter's constitutional rights against unlawful seizures under the fourth amendment, which issue we need not decide, they are rights assertable by her alone and not by the defendant. A defendant "may not obtain exclusion of evidence on ground that someone else's rights were violated." *United States v. Williams*, 737 F.2d 594, 616 (7th Cir. 1984). *See also United States v. Payner*, 447 U.S. 727, 731 (1980). Kaprelian therefore cannot exclude the telephone number or the ensuing evidence on the basis of a violation of his daughter's fourth amendment rights, even if we were to find that such a violation had occurred.

Kaprelian next argues that the evidence should be excluded on the ground that it was obtained in violation of a purported parent-child privilege. Kaprelian claims that the parent-child privilege resembles the marital privilege, the attorney-client privilege, and the confessor-penitent privilege. Although he does not expressly rely on it, we assume that Rule 501 of the Federal Rules of Evidence is the basis for any parent-child privilege.

Rule 501 provides that in a criminal action the availability of any privilege is "governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." FED. R. EVID. 501. Based upon reason and experience, the courts consistently have recognized, as Kaprelian points out, the marital privilege, the attorney-client privilege, the confessor-penitent privilege, and the doctor-patient privilege, although the precise boundaries of the privileges

constantly are being debated and redefined. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383 (1981) (rejecting "control group" test for attorney-client privilege in corporate context as too narrow); *United States v. Byrd*, 750 F.2d 585 (7th Cir. 1984) (holding that spousal testimonial privilege not assertable where the allegedly privileged communications occurred during a long-term separation). Thus the existence of a parent-child privlege must be determined upon a reading of the principles of common law.

Privileged communications are recognized by the courts "to protect those interpersonal relationships which are highly valued by society and peculiarly vulnerable to deterioration should their necessary component of privacy be continually disregarded by courts of law." *United States v. Byrd*, 750 F.2d at 589. Kaprelian argues on the facts of this case, that the F.B.I. agents, by questioning his daughter regarding his whereabouts, violated his familial privacy. This questioning, Kaprelian argues, resulted in "a statist intrusion into the most cherished of human relationships . . . with the subsequent sense of betrayal, however unjustified, that the minor daughter must bear for having been a proximate source of the location and arrest of her father." Appellants' br. at 13.

Kaprelian relies principally on *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983), to support the existence of the privilege. The court in *Agosto* undertook a detailed analysis of the constitutional and policy bases which it believed supported its finding that the parent-child privilege should be recognized by the federal courts. In *Agosto*, the district court quashed a grand jury subpoena which would have required the witness to give testimony which might be included in evidence for use in any contemplated indictment of the witness's father. After a rather painstaking discussion of the origin and scope of the testimonial privileges and after and equally painstaking analysis of the constitutional protections for the family's right to privacy, the *Agosto* court concluded that the "expansive approach toward federal interpretation of testimonial privileges" under Rule 501, 553 F. Supp. at 1322,

justified "affording the same protection to the parent-child relationship" as is afforded the marriage relationship itself. *Id.* at 1325. The court thus concluded:

> There can be little doubt that the confidence and privacy inherent in the parent-child relationship must be protected and sedulously fostered by the courts .... Agosto may claim the parent-child privilege not only for confidential communications which transpired between his father and himself, but he may likewise claim the privilege for protection against being compelled to be a witness and testify adversely against his father in any criminal proceeding.

Id.

Undeniably "[t]here does exist a 'private realm of family life which the state cannot enter,' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), that has been afforded both substantive and procedural protection" under the due process clause of the fourteenth amendment, *Smith v. Organization of Foster Families*, 431 U.S. 816, 842 (1977) (footnotes omitted). As the *Agosto* court recognized, the Supreme Court cases are essentially divisible into two categories: cases challenging the constitutionality of the intrusion by the state into the family structure or its definition,[2] and cases involving the right to make certain decisions affecting the family unit.[3] However one chooses to characterize these cases, they "establish that the Constitution protects the sanctity of the family precisely because the institution of the family is

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[2] *See, e.g., Palmore* v. *Sidoti*, 52 U.S.L.W. 4497 (Apr. 25, 1984); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972).

[3] *See, e.g., City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Parnham v. J.R.*, 442 U.S. 584 (1979); *Zablocki v. Redhail*, 434 U.S. 373 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Justice Powell).

But that does not end our inquiry. What the *Agosto* court failed to recognize is that such privileges, whether they be those traditionally recognized by the common law or new ones which courts seek to engraft into the common law, "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). The Court reaffirmed the narrowness of privileges under Rule 501 in *Trammel v. United States*, 445 U.S. 40 (1980), when it modified the spousal privilege "so that the witness-spouse alone has a privilege to refuse to testify adversely," 445 U.S. at 53, and in *United States v. Gillock*, 445 U.S. 360, 366 (1980), wherein the Court refused to construct an evidentiary privilege barring the introduction of evidence of legislative acts in federal criminal prosecutions against state legislators. We thus believe that it would be inappropriate to engraft a parent-child privilege into Rule 501.

The Court's analysis in *Nixon* is particularly instructive on why the parent-child privilege should be rejected. In *Nixon*, President Nixon was seeking to quash a subpoena requesting the President to turn over to the district court various pieces of evidence, including tape recordings of telephone conversations. The President resisted the subpoena because it would require him to release "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." 418 U.S. at 703. The Supreme Court began its analysis of the President's claim by recognizing that the importance of the "need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties . . . is too plain to require further discussion." *Id.* at 705. The need for confidentiality, the Court recognized, had to be weighed against the fundamental and comprehensive need of our adversary

system of criminal justice to develop all relevant facts, within the framework of the rules of evidence. *Id.* at 709, 711-12. After weighing the various interests at stake in Nixon, the Court concluded that in that case the "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713. We similarly believe that Kaprelian's generalized claims regarding the well-recognized sanctity of family life must give way to the overriding needs of the truth-seeking process.

Moreover, every federal court, other than *Agosto*, that has considered the claim for a privilege based solely on the parent-child relationship has rejected the claim.[4] The Fourth, Fifth, Ninth, and Eleventh Circuits have ex-

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[4] The government also points out that *In re Greenberg*, 11 Fed. R. Evid. Serv. 579 (D. Conn. 1982), also upheld a mother's claim that she could not testify against her daughter. That case is clearly distinguishable from *Agosto* and the present case in that the mother's claim was not based solely on the parental relationship but also upon deeply held religious views. The *Greenberg* court points out the narrowness of its holding:

> The asserted parent-child privilege is available to Mrs. Greenberg, though only insofar as it rests on her religious conviction that she cannot testify against her daughter willingly or under legal compulsion. The court emphasizes, however, that this privilege establishes a narrow exception to Mrs. Greenberg's legal obligation to testify before the grand jury in accordance with the existing order of this court.

Id. at 587. We have no occasion in this case to comment on the correctness of the analysis in *Greenberg*.

We also point out that apparently only one state has currently recognized any type of parent-child privilege. *See In re Application of A & M*, 61 App. Div. 2d 426, 403 N.Y.S. 2d 375 (1978). Several states have expressly rejected the parent-child privilege. *See People v. Sanders*, 99 Ill.2d 262, 75 Ill. Dec. 682, 457 N.E.2d 1241, 1244-45 (Ill. 1983); *Three Juveniles v. Commonwealth*, 390 Mass. 357, 455 N.E.2d 1203, 1206 (Mass. 1983); *Cissna v. State*, 352 N.E.2d 793, 795 (Ind. App. 1976).

pressly rejected the parent-child privilege. *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (11th Cir. 1984); *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982); *In re Grand Jury Proceedings (Starr)*, 647 F.2d 511 (5th Cir. 1981); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980). *See also In re Matthews*, 714 F.2d 223 (2d Cir. 1983) (witness compelled to testify against mother-in-law, father-in-law, and brother-in-law); *United States v. (Under Seal)*, 714 F.2d 347 (4th Cir. 1983) (witness compelled to testify against brother and cousin). We agree with this weight of authority and now reject Kaprelian's claim of a parent-child privilege.

In *Jones*, for example, a twenty-nine year old male was held in contempt for refusing to answer grand jury questions during an investigation of his father. The witness based his refusal on an asserted parent-child privilege and on the Supreme Court's decision in *Trammel*. The Fourth Circuit rejected Jones's asserted privilege holding that his reliance on *Trammel* was misplaced. "The result in *Trammel*, operating as it did to narrow, not expand, the scope of marital testimonial privilege, stands as an obstacle in Jones' path, not as an assistance." *Jones*, 683 F.2d at 818.

The Ninth Circuit, sitting en banc in *Penn*, also rejected the parent-child privilege on facts similar to this case. *Penn* involved the government's appeal from an order of the district court granting the defendant's motion to suppress a jar of heroin taken from defendant's back yard. The heroin was found after local police officers gave the defendant's five-year-old son a five dollar bill if he would show police the location of the heroin. Sitting en banc, the Ninth Circuit reversed the exclusion of the heroin, holding that "[t]here is no judicially or legislative recognized general 'family' privilege." 647 F.2d at 885. Among other things, Penn argued to the court that the bribe of her son violated substantive due process in that it intruded on a "zone of privacy" comprising family life. *Id.* at 883. The court held that to the extent that there could

be found an intrusion in that case, the defendant was not entitled to a constitutional remedy. The court went on to point out, in admitting the evidence, that "past substantive due process cases based on 'family' interests all have involved systematic regulation of the interest," and not isolated incidents of "intrusion" into family privacy. *Id.* at 884. Finding "[n]o legal basis, constitutional or other," to support the "family" privilege, the Ninth Circuit reversed the district court's suppression order. *Id.* at 885. We similarly find no basis for the parent-child privilege in criminal cases.

Even were there some substantial support for the defendant's proposition that there is a parent-child privilege this case would not be one in which it could be applied. Privileges apply only to prevent the use of testimony in a judicial proceeding. Kaprelian's daughter gave the F.B.I. agent his telephone number during the F.B.I.'s investigation of the jewel robbery. As the Supreme Court has noted, "[n]either *Hawkins*, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other to aid in the other's apprehension." *Trammel*, 445 U.S. at 52 n.12. Kaprelian makes no assertion that the government ever intended to call his daughter at the trial; his assertions of privilege are based solely on her questioning during the investigation. Thus neither this phone number nor any other evidence obtained through this critical investigative lead are subject to suppression by the district court.

We thus reject Kaprelian's claim that there exists a privilege for communications between parents and their children in criminal cases and find no error in the admission of evidence developed as a result of obtaining Kaprelian's telephone number from his daughter.

III. INVESTIGATIVE STOPS OF KAPRELIAN

Kaprelian's next claim of error involves two incidents in the hallway of Davies's apartment building. The first incident occurred on August 26, 1982. At about 1:00 p.m.,

both Davies and Kaprelian were seen entering Davies's apartment building, which was under surveillance by the F.B.I. as part of its investigation of the jewel theft. Kaprelian was carrying nothing and Davies was carrying a purse. Fifteen minutes later Davies left the building, went to the garage of the building and drove a yellow Oldsmobile to the front of the building. After she left the car and walked toward the front door of the building, two F.B.I. agents arrested her. At approximately the same time that these agents were following Davies, two other agents were watching Davies's ninth floor apartment from the building's hallway. Kaprelian left the apartment at some time during this surveillance.

As Kaprelian was leaving Davies's apartment, the agents stopped him to ask him a few questions and also conducted a pat-down search for weapons. During their questioning, the agents asked Kaprelian whether he knew "Helen Benson," one of Davies's aliases and the one under which she rented the apartment, and asked him whether he recognized a picture of Davies. Kaprelian denied knowing Benson or recognizing the woman in the photograph and demanded that he be allowed to leave. The agents refused to allow Kaprelian to leave until they had the approval of their superiors and detained him in the hallway for another twenty-five to thirty minutes.

The second encounter with Kaprelian occurred the following day, August 27, when Kaprelian was again seen leaving Davies's apartment. Two Harwood Heights, Illinois, police officers had stationed themselves outside of Davies's apartment and were under orders from the F.B.I. not to let anyone enter or leave the apartment until the F.B.I. could secure a search warrant. As Kaprelian was leaving the apartment the officers stopped him and told him that he was not free to leave.

One of the agents who had questioned Kaprelian on August 26 testified at trial about Kaprelian's denials of knowledge of Davies. This testimony was apparently admitted as evidence of a false exculpatory statement by

Kaprelian. During a pretrial suppression hearing, the district court held that this testimony was admissible because the stop of Kaprelian on August 26, at least up to the point that Kaprelian demanded that he be allowed to go was a classic *Terry*-stop, *Terry v. Ohio*, 392 U.S. 1 (1968), and that because the testimony which the government sought to admit was derived only from this portion of the stop, there was no basis on which to suppress the testimony.

Kaprelian asserts that the district court incorrectly concluded that the stop on August 26 was not an arrest, arguing that "[t]he location, nature of the seizure, and length of the detention demonstrate that this was an arrest." Appellants' br. at 15. Kaprelian relies principally on *Sharpe v. United States*, 660 F.2d 967 (4th Cir. 1981), *rev'd* 105 S. Ct. 1568 (1985), for the proposition that because Kaprelian was held for approximately forty-five minutes, his detention was a *per se* illegal detention. In *Sharpe*, the Fourth Circuit analyzed the facts under *Terry* and determined that the length of the detention alone made it invalid. The court stated that it could not "overemphasize the importance of the brevity requirement for investigative stops predicated upon less than probable cause." 660 F.2d at 970. The court found that the thirty to forty minute detention of the auto's driver and the fifteen minute detention of the truck's driver without probable cause for arrest "effectively transformed them into de facto arrests without basis in probable cause, unreasonable seizures under the Fourth Amendment." *Id.* The Supreme Court, however, recently reversed the Fourth Circuit's decision in *Sharpe*. 105 S. Ct. 1568.

As the Supreme Court noted in *Sharpe*, one of the benchmarks of *Terry* analysis, however, is to examine each case and to determine whether in the circumstances the stop was justified at its inception and whether the stop was "reasonably related in scope to the circumstances which justified the inference in the first place." *Sharpe*, 105 S. Ct. at 1573, quoting *Terry*, 392 U.S. at 20. The initial justification must come from articulable and objec-

tive facts. *Terry*, 392 U.S. at 29. The stop must be brief, and only long enough to satisfy the investigative nature of the stop. *Sharpe*, 105 S. Ct. at 1574, *Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *United States v. Borys*, No. 84-1895, slip op. at 13 (7th Cir. June 27, 1985).

"If the purpose underlying a *Terry*-stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams* [*v. Williams*, 407 U.S. 143 (1972)]." *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981)

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest simply to shrug his shoulders and allow a crime to occur or a criminal to escape . . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. at 146-47. As the Supreme court's decision in *Sharpe* makes clear, that there is no talismanic time beyond which any stop initially justified on the basis of *Terry* becomes an unreasonable seizure under the fourth amendment. 105 S. Ct. at 1575. In view of all the facts of this case known to the F.B.I. on August 26, we believe as the district court did that the stop of Karpelian on August 26 was not an unreasonable seizure under *Terry*.

The district court's findings regarding the circumstances of the stop in this case are amply supported on the record before us. The court specifically found that

> [t]hrough F.B.I. departments, the agents had reason to believe that both Davies and Kaprelian were involved in the robbery . . . . His presence in the hallway

> of Davies's apartment [the day following the jewel theft] reinforced that reasonable suspicion that Kaprelian was involved with Davies in the crime.

The investigating agents also had evidence indicating that Davies and Kaprelian were both suspects in three separate cases involving interstate transportation of stolen property during the 1970s and linking them to a jewelry theft in Missouri. Moreover, the agents had discovered that shortly after Davies was seen back in the Chicago area six hours after the stop in LaCrosse, Wisconsin, she entered a bar near her home looking for "Marty." The connection between Kaprelian and Davies also was confirmed on August 26th during the questioning of Kaprelian's daughter. We therefore agree with the district court that articulable and objective facts justified the initial stop.

Armed with the information that justified the initial stop and Kaprelian's denial of knowledge of Davies so shortly after the crime being investigated, we think that under *Terry* it was reasonable for the agents to detain Kaprelian an additional thirty minutes for further questioning and advice from their superiors.

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.... A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.

Sharpe, 105 S. Ct. at 1575-76 (citations omitted). Davies was arrested on probable cause shortly therafter. Kaprelian was not moved from the apartment building nor in any other way seriously refrained in his movements. We

therefore believe that the entire forty-five minute stop was a "temporary seizure for the purpose of questioning limited to the purpose of the stop." *Florida v. Royer*, 103 S. Ct. 1319, 1324 (1983).

Kaprelian next claims that his detention in the same hallway on August 27 amounted to an arrest and that certain evidence obtained at that time must be suppressed. The evidence which he seeks to suppress, however, is one of the agent's statements at trial that he had observed Kaprelian in the hallway of the apartment on August 27. Regardless of the validity of his detention on August 27, we fail to seek how the statements of the agent's observations can be suppressed. They are not statements by Kaprelian, nor are they in any way connected with his arrest or detention; the agent's observations in no way implicate the fourth amendment. The fourth amendment protects one's reasonable expectations of privacy. As such, the protections do no extend to one's movements in plain view. Since Kaprelian does not claim that the officer's presence in the hallway of Davies's apartment building violated any expectation of privacy he may have had, we fail to see how he now can complain that they saw him exiting her apartment. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

IV. IN-COURT IDENTIFICATION

Kaprelian next argues that an in-court identification of Kaprelian by Deborah Vogl was unreliable and should have been suppressed. On the evening of the jewel theft, Deborah Vogl was in Pettibone Park in LaCrosse, Wisconsin, with several of her friends. She observed two cars, a Cadillac and a Buick, stop in the park and the driver of the Cadillac get into the Buick and leave the Cadillac unattended in the park. She observed the driver of the Cadillac from about fifteen feet away, and "was really focusing a lot of attention" on the Cadillac because it "had

almost hit [her] roommate and [her] dog." Tr. 190. About an hour later, she described the driver of the Cadillac to police as being 5'10", slim, possibly in his early thirties, dark hair and dark mustache, a white male with dark skin and possibly of Greek or Italian background. R. 113. On September 29, 1982, Vogl viewed six black and white photographs, from which she identified a photograph of Kaprelian as having a "pronounced similarity to the driver of the Cadillac . . . [but with] an apparent lack of hair immediately behind the forehead . . . [and no] mustache." R. 113.

Between September 29, 1982, and December 8, 1983, when Vogl testified at Kaprelian's trial, she did not again view Kaprelian in a line-up and was not otherwise asked formally to identify Kaprelian. At trial, Vogl was asked to identify the man she saw driving the Cadillac. She identified Kaprelian. Vogl testified on a Thursday afternoon. Kaprelian did not object to her testimony at the time and did not file a formal motion to suppress her in-court identification of him until the following Monday morning. Kaprelian now argues that the district court incorrectly denied the suppression of that identification.

Kaprelian bases his request to suppress the identification on the grounds that the identification was unreliable. He bases his unreliability argument on three factors. First, Vogl stated to police officers on the evening of the theft that the driver of the Cadillac was "in the vicinity of 5'10"," R. 113, whereas Kaprelian is in fact 5'3". Second, Kaprelian argues that Vogl was a biased witness, in that she was an intern for the Wisconsin Department of Corrections. Finally, he argues that the in-court identification was unnecessarily suggestive because at the three tables in the courtroom there were only five males and only one of them, Kaprelian, even vaguely fit her "slim male" description.

In analyzing the validity of this in-court identification, we are guided by the standards which the Su-

preme Court set forth in *Simmons v. United States*, 390 U.S. 377, 384 (1968).

> [C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

One month after Vogl saw a man whom she shortly thereafter described to the police leave a Cadillac in LaCrosse, Wisconsin, she picked Kaprelian out of a six-photo display. Although she found some discrepencies between the photo and the man she recalled seeing on August 25, she felt that certain features bore a "pronounced similarity" to the driver of the Cadillac. The major discrepency was the hairline, lack of a mustache, and height. Kaprelian has not argued, however, that the photo identification was impermissibly suggestive. Having failed to assert that the photographic identification in which Vogl identified Kaprelian was impermissibly suggestive we will not now hold the subsequent in-court identification invalid.

Vogl's previous identification of Kaprelian diminishes the likelihood of an in-court misidentification. Because Kaprelian did not object to the identification at the time it was made at trial, we believe that the trial court properly left the credibility of Vogl's ability to identify Kaprelian to the jury. She testified at trial as to the length of her viewing of the driver of the Cadillac, the weather and lighting conditions, and the general circumstances of the occurrence on August 25. She also was subject to cross-examination regarding her photographic identification. The jury was fully aware of any bias that Vogl may have had to testify favorably for the prosecution because of her employment with the Wisconsin Department of Corrections.

Moreover, a defendant does not have a constitutional right to an in-court line-up identification of the defend-

ant, *United States* ex rel. *Clark v. Fike*, 538 F.2d 750, 755-56 (7th Cir. 1976), and the exact manner of the identification is addressed to the trial court's discretion. *United States v. Williams*, 436 F.2d 1166, 1168-69 (9th Cir. 1970). Generally, the question of the suggestiveness or credibility of the in-court identification is to be resolved ultimately by the jury after the defendant has had an opportunity to test the accuracy of an identification through cross-examination. *United States v. Bush*, 749 F.2d 1227, 1231 (7th Cir. 1984). Only when there is "a very substantial likelihood of irreparable misidentification," *Simmons v. United States*, 390 U.S. 377, 384 (1968), is the credibility of the identification not left for the jury to decide. *Bush*, 749 F.2d at 1231. We therefore find no error in leaving the reliability of the identification for the jury's determination.

V. CROSS-EXAMINATION

Kaprelian next argues that the trial court committed reversible error by refusing to allow Kaprelian to "elicit from Special Agent [Joseph] Dragon the single fact that a properly conducted line-up is better designed to secure a fair and reliable identification procedure than a show-up or other [identification] procedure." Appellants' br. at 26. The government contends that its objections to Kaprelian's cross-examination were properly sustained at trial because "the specific questions asked were both improper and irrelevant." Appellee's br. at 23.

Kaprelian cross-examined Dragon extensively about the identification methods used for each of the several eye-witnesses to the events of the jewel theft and secured Dragon's admission that no witnesses were ever asked to view Kaprelian in a line-up. The court then sustained the goverment's objection to Karelian's question that "You have been trained that the scientific and proper method for obtaining identification is through a line-up, haven't you?" Tr. 282. After continued questioning on how line-ups are generally conducted, the court again sustained the government's objection.

Q. What have you been trained as to concerning whether you should show a suspect singularly to a witness?

A. I am [not] sure I understand what you mean.

Q. Have you been told whether you should—

GOVERNMENT: Judge, I am going to object. This is improper.

THE COURT: I am going to sustain the objection as to the next question.

Tr. 282-83.

In examining the validity of the trial court's sustaining the government's objection to these two cross-examination questions, we must consider that "[t]he right to unbridled cross-examination of an adverse witness is not absolute and a trial judge has considerable discretion to place restrictions on the scope of cross-examination once the right to confront witnesses has been substantially exercised." *United States* ex rel. *Scarpelli v. George*, 687 F.2d 1012, 1014-14 (7th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). Kaprelian asked Dragon numerous questions regarding how the witnesses had identified him and about the fact that no line-up was ever conducted. R. 274-282. We think these questions gave Kapelian the "substantial exercise" of his right to confront Dragon. That Kaprelian was not allowed to solicit Dragon's "expert" opinion about the hypothetical preference for and reliability of a line-up was not error.

Moreover, "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence and his action is to be sustained unless manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962). As the Supreme Court has recognized, whether the identification procedure is a line-up, a show-up, or the presentation of the subject alone to the witness, "[i]t is obvious that risks of suggestion attend either form of confrontation and increase the dangers inherent in eye-

witness identification." *United States v. Wade*, 388 U.S. 218, 229 (1967). The critical inquiry in any given case is not necessarily what type of identification procedure was used, but whether the specific procedure was reliable or whether it was unnecessarily suggestive. *Neil v. Biggers*, 409 U.S. 188, 198 (1972). "The danger that the use of [an identification] technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." *Simmons v. United States*, 390 U.S. at 384. Kaprelian was never prevented from undertaking this line of cross-examination. We thus believe that the trial court acted quite properly in excluding Kaprelian from eliciting Dragon's opinion about the reliability of an identification which never occurred.

VI. MISCELLANEOUS CLAIMS

The defendant claims two other errors which we find without merit. The first is that the government's labeling of its exhibits was argumentative, and thereby violated the defendant's right to due process. This court has held that labels on exhibits which are "a neat condensation of the government's whole case against the defendant" constitute prejudicial error. *United States v. Ware*, 247 F.2d 698, 700 (7th Cir. 1957). *See also United States v. Brown*, 451 F.2d 1231, 1233 (5th Cir. 1971).[5] But the labels on the

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[5] In *Ware* the evidence envelopes contained notations such as these notations by the narcotics agent written on exhibit no 1:

Treasury Department
Bureau of Narcotics

District No. 9 Case No. 111-7208
Name Larry Ware Alias "Nick"
Address Chicago, Illinois

Evidence 1 oz. 266 grains Heroin—contained in 3 glassine envelopes
(Not original containers)

(Footnote continued on following page)

government's exhibits in this case to which the defendant objects come nowhere close to the type of labels found prejudicial in *Ware* and *Brown*. The labels merely state

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[5] *continued*

How Obtained—Purchased by W. H. Newkirk
Where obtained 4000 block Prairie Ave., Chicago, Ill.
Date Oct. 23, 1954 Time 12:00 Noon
Amount paid, $600.00
Witnesses: J. T. Fields
N. M. Durham
Agent reporting case William H. Newkirk
Remarks: Exhibit #2 weighed and sealed by Agent J. T. Fields, in the presence of Agent F. U. Turner and delivered to the U. S. Chemist, Chicago, Ill., by Agent Fields, for analysis.

(Reverse of first envelope)
Weighed and Sealed
1 Oz. 266 grains Heroin
Oct. 25, 1954
By: J. T. Fields
Witnessed by F. U. Turner

247 F.2d at 699 n.1.

Similarly, *Brown* held that it was error for the government to submit its evidence in envelopes with notations similar to the following:

District: No. 6 Case No: (illegible)
Name: Louis Hayes, et al alias Mr. Clean
Address: Jacksonville, Florida
Evidence: Two one half (illegible) suspected Cocaine
How Obtained: Purchased by Agent Wilkes
Where Obtained: Front of Sportsman Grill, 510 Broad St. Jacksonville, Florida
Date: 9/6/68
Amount Paid: $155.00
Witnesses: Agents Jessup and Curry
Agent Reporting Case: Agent Jessup
Remarks: Evidence turned over to Agent Jessup for transmittal to U. S. Chemist, Atlanta, Georgia.

451 F.2d at 1233 n.2.

the location in which of the various pieces of evidence, including the jewelry and Mr. Romero's business records, were found. For example, some of the labels read simply "Oldsmobile-1" and "Apartment 5A," indicating that the piece of evidence was found either in the Oldsmobile or in Davies's apartment. The labels were neither argumentative nor "condensations of the government's case;" they were simply identifying marks.

The defendant also claims that F.B.I. Agent Donald Bishop's single reference on cross-examination to the Oldsmobile as belonging to Davies and Kaprelian constituted reversible error. We disagree. To the extent that this statement caused any error, the district court gave immediate and sufficient limiting instructions to the jury. *Opper v. United States*, 348 U.S. 84, 95 (1954) ("Our theory of trial relies upon the ability of a jury to follow instructions."). We fail to see how one statement suggesting ownership of Davies's automobile to Kaprelian is "persuasive evidence of his guilt." Appellants' br. at 33. There was an abundance of evidence at trial tying Kaprelian to Davies, including evidence that he and Davies both had used the auto in question. We thus find no error in Bishop's statement.

On consideration of the entire record before us in this case, we affirm Kaprelian's conviction.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—7-25-85—450

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 29, 1985

Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Judge

UNITED STATES OF AMERICA Plaintiff-Appellee No. 84-1239 vs. PATRICIA DAVIES and MARTIN KAPRELIAN Defendants-Appellants)	) Appeal from the) United District) Court for the) Northern District) of Illinois,) Eastern Division.) No. 82 CR 597) John A. Nordberg, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendant-Appellant Martin Kaprelian, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

AFFIDAVIT

ARMENSUE KAPRELIAN, being first duly sworn on oath, deposes and states as follows:

1. I am Armensue Kaprelian.

2. I will be 17 years old on October 27, 1983.

3. I am the youngest daughter of Martin Kaprelian.

4. In 1982, my father provided me with a phone number so that I could communicate with him. My father had given me this phone number, exclusively. The phone number was installed solely so he and I could talk to each other.

5. On a date in August, 1982, I left my house and was riding my bike to the "El". I was 15 years old. I rode down Lunt and turned into Wolcott. As I

turned on Wolcott, a car with some men in it was following me. They honked their horn at me. They pulled up next to me and forced me over to the side. I was scared. They asked me for identification. They told me they were the FBI. I felt I could not leave and had to answer their questions. At one point they even told me to go and move from where I was standing. I did what they told me. They asked me a lot of questions about my father and his friends. I was crying. I was very upset. They asked me if I knew where my father lived; I didn't. At one point, I threw my bike down and started to leave. I was told to come back. I believed I had to return. I felt I was required to answer their questions. I gave them the phone number that my father

had given me so that he and I could communicate. If they had told me that I did not have to give information about my father, I would not have given them any information. I only gave them the information because I felt that they were FBI agents and that they were keeping me there and that I had to give the information.

6. The phone number was exclusively for my father and I to use. I had never given that phone number to anybody else.

ARMENSUE KAPRELIAN

Subscribed and sworn to
before me this 23rd day
of October, 1983.

Notary Public